

ORIGINAL FILED

DEC 19 2000

SUPERIOR COURT
SPOKANE COUNTY, WA

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARCO BARBANTI, individually and on
behalf of a class of all others similarly situated,

Plaintiff,

v.

W.R. GRACE & COMPANY-CONN (a
Connecticut corporation); W.R. GRACE &
COMPANY (a Delaware corporation); W.R.
GRACE & CO., a/k/a GRACE, an association of
business entities; SEALED AIR
CORPORATION (a Delaware corporation); and
WILLIAM V. CULVER, resident of the State of
Washington,

Defendants.

NO. 00-2-01756-6

CLASS ACTION

ORDER GRANTING PLAINTIFF'S
MOTION FOR CLASS CERTIFICATION
PURSUANT TO CR 23(b)(2)

Motion No. 1

1. BASIS

THIS MATTER came before the Court for hearing on the 21st day of September, 2000, on
Plaintiffs' Motion for Class Certification. All parties were represented by counsel.

In deciding the Motion, the Court considered the oral argument of counsel together with the
documents identified in the attached Memorandum Decision.

2. FINDINGS

This Court issued its written Memorandum Decision on this matter on November 28, 2000,
and the Court hereby adopts its findings and ruling issued on that date. The Memorandum

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION PURSUANT TO CR 23(b)(2): 1
(Motion No. 1)

LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1401 WASHINGTON TRUST FINANCIAL CENTER
117 W. SPRAGUE AVE.
SPOKANE, WA 99201-0406
(509) 483-4555

Decision is attached to this Order and fully incorporated herein by reference. In particular, the Court expressly finds:

- 1). That the numerosity requirement has been met based on the evidence presented;
- 2). That named plaintiff's claims present questions of law and fact common to the class;
- 3). That the claims of the above-named plaintiff are typical of the claims of the class he seeks to represent;
- 4). That named plaintiff and his counsel can fairly and adequately represent the interests of the class; and
- 5). That the action brought by plaintiff is equitable in character and is properly certified under Civil Rule 23(b)(2).

3. ORDER

THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion is Granted and that this action may be maintained as a class action pursuant to CR 23 and its subdivision CR 23(b)(2) with respect to the claims asserted in the Class Action Complaint against W. R. Grace & Company-Conn., W. R. Grace & Company, W. R. Grace & Co., a/k/a Grace, an association of business entities, Sealed Air Corporation, and William V. Culver. (The Court has not made a finding as to the existence or non-existence of the entity sued as "W.R. Grace & Co. a/k/a Grace, an association of business entities").

The Class shall be composed of and defined as: All owners or occupiers of real property located in the state of Washington in which Zonolite Attic Insulation has been installed.

DONE IN OPEN COURT this 17th day of December, 2000.

KATHLEEN M. O'CONNOR

KATHLEEN M. O'CONNOR
JUDGE

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION PURSUANT TO CR 23(b)(2): 2
(Motion No. 1)

By: Darrell W. Scott
DARRELL W. SCOTT, WSBA # 20241
Attorneys for Plaintiff

Approved as to Form and Notice
Of Presentment Waived:

PERKINS, COLE, LLP

By: Approved telephonically by V.L. Woolston 12/19/00
V. L. Woolston, Jr., WSBA #9453
Rocco N. Treppiedi, WSBA #9137
Attorneys for Defendants Grace

PAINE, HAMBLIN, COFFIN, BROOKE & MILLER

By: Approved telephonically by David Broom 12/19/00
Donald G. Stone, WSBA #7547
David L. Broom, WSBA #02096
Attorneys for Defendants Sealed Air Corporation

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION PURSUANT TO CR 23(b)(2): 3
(Motion No. 1)

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARCO BARBANTI, ETAL,

Plaintiff,

vs.

W. R. GRACE & CO. ETAL,

Defendant

Case No.: No. 00-2-01756-6

MEMORANDUM DECISION (MOTION #1)

This matter came before the court for oral argument on September 21, 2000, on Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2). The following pleadings were considered by the court:

1. Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2)
2. Brief in Support of Class Certification
3. Declaration of Kristy L. Bergland
4. Declaration of Richard S. Lewis
5. Declaration of Allan M. McGarvey
6. Affidavit of Darrell W. Scott
7. Declaration of Fabrice Vincent
8. Declaration of Edward J. Westbrook
9. Plaintiffs' Supplemental Submission in Support of Class Certification
10. Declaration of Fabrice N. Vincent and attachments thereto
11. Grace Defendants' Brief in Opposition to Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2) and 23(b)(3)
12. Declaration of Rocco N. Treppiedi and attachments thereto

- 1 13. Affidavit of Donald J. Hurst (submitted by Plaintiffs in support of the application for
- 2 Preliminary Injunction and submitted by Defendants' in support of their opposition to
- 3 Plaintiff's Class Certification motion) and attachments thereto
- 4 14. Defendant Sealed Air Corporation's Joinder in Grace's Argument and Brief in Opposition to
- 5 Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2) and 23(b)(3)
- 6 15. Plaintiffs' Reply in Support of Motion for Class Certification.
- 7

8 STATEMENT OF FACTS

9 Plaintiff Barbanti brings this action on behalf of a purported class of all owners and
 10 occupiers of real property located in the State of Washington in which Zonolite Attic Insulation
 11 has been installed. Defendants' are alleged to be the manufacturers of this product. The claims
 12 asserted include product liability claims under the Washington Products Liability Act (WPLA),
 13 RCW 7.72 and violations of the Consumer Protection Act (CPA), RCW 19.86.

14 Plaintiffs' are seeking injunctive relief as well as compensation for property damage
 15 suffered by class members. Plaintiffs are not seeking compensatory damages for any illness a
 16 class member may have contracted as a result of exposure to Zonolite Attic Insulation nor are
 17 they seeking to establish a medical-monitoring regime.

18 DISCUSSION

19 In Washington the process of class certification is governed Civil Rule CR 23. At the
 20 outset the plaintiffs must demonstrate that they meet the four requirements of CR 23(a):
 21

22 One or more members of a class may sue or be sued as representative
 23 parties on behalf of all only if (1) the class is so numerous that joinder
 24 of all members is impractical; (2) there are questions of law or fact
 25 common to the class; (3) the claims or defenses of the representative

parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Subsection one is known as "numerosity". The only evidence presented with respect to this section was plaintiffs' reference to a 1985 EPA publication which estimated Zonolite was installed in 900,000 homes between 1974 and 1984. From that number plaintiffs' estimate at least 18,800 Washington homes may contain this insulation. Plaintiffs' argue this is a conservative number as this product was on the market for many years. The defendants' did not challenge this number. The numerosity requirement has been met.

Subsection two is known as "commonality" and requires evidence questions of law or fact common to the class. Plaintiffs' focus on a common course of conduct by the defendants towards all potential class members i.e., a pattern of alleged misrepresentations in advertising the product, failure to warn, etc. as meeting this requirement.

Also, plaintiffs' seek equitable relief for the class as a whole in the areas of warnings, education, and remediation, not individual relief. Plaintiffs' do acknowledge in their supplemental brief that there may be some potential class members who are already aware of the alleged problems with Zonolite Attic Insulation and have expended money to remove the insulation. The injunctive relief suggested by the plaintiffs would include a defendant-funded remediation program where, presumably, class members would apply for funds to remove the insulation.

However, plaintiffs assert the fact there may be some compensation for remediation does not detract from the nexus of common facts particularly with respect to the liability issues, I agree. The issue of monetary damages is more properly considered in connection with the analysis of whether CR 23(b)(1) or (2) or CR 23(b)(3) applies, not to commonality. The commonality requirement has been met.

1 Subsection three is "typicality". Does the plaintiff's complaint arise from the same
2 conduct on the part of the defendant that other putative class members may have experienced? It
3 does. Are there any unique defenses applicable to the plaintiff which would unduly prolong
4 prosecution of the case from the perspective of putative class members? There does not appear
5 to be. A number of cases have been cited which stand for the proposition that "... challenging
6 the same unlawful conduct that affects both the named plaintiff and the rest of the putative class
7 usually satisfies the typicality requirement, despite disparities in individual factual scenarios."
8 *Cullen v. Whitman Med. Corp.*, 188 F.R.D.226, 230 (E.D. Pa. 1999). The typicality requirement
9 has been met.

10 Subsection four is the adequacy of representation and refers to both the class counsel and
11 the class representative(s). Class counsel are very experienced in class action litigation and
12 defendants have not taken issue with plaintiffs' counsels' ability to provide adequate legal
13 representation. Rather the focus is whether Mr. Barbanti, as class representative, can adequately
14 represent the class.

15 Defendants' assert Mr. Barbanti is an inadequate class representative because: (1) he has
16 a conflict of interest with putative class members because he alleged only limited statutory
17 claims; (2) he does not have a claim under the CPA; (3) he is engaging in "claim splitting"; (4)
18 he lacks standing to request injunctive relief because he knew Zonolite contained asbestos before
19 he began the lawsuit; and (5) he lacks credibility.

20 Plaintiff responds that a class representative is not required to assert every possible claim
21 and some claims are not suitable for a class action resolution. This is particularly true of
22 personal injury claims. In a class action, the concept of "claim splitting" is less of a concern than
23 it would be in an individual action. It can be more efficient to manage some issues in a class
24 action setting, i.e. liability issues, and this will not preclude individual litigation of other claims,
25 i.e. personal injury claims.

1 With respect to the "standing" argument, this court is not aware of any Washington
2 jurisdictional authority which would prohibit the court from granting plaintiffs' requested relief
3 of a warning to the public simply because Mr. Barbanti knew Zonolite may have contained
4 asbestos.

5 The issue of Mr. Barbanti's credibility was raised in connection with his personal
6 response to the discovery of Zonolite Attic Insulation in some of his properties and his alleged
7 failure to inspect all of his properties or timely warn his tenants. This fact issue has yet to be
8 adjudicated by the court and, if true, has not precluded the plaintiffs from pressing for the
9 hearing of the Motion for Preliminary Injunction.

10 The adequacy of representation has been met.

11 After finding the initial four requirements of CR 23(a) have been met, the court next turns
12 to the applicability of CR 23(b)(1) or (2) and/or CR 23(b)(3). Plaintiffs' assert as they are
13 primarily requesting injunctive relief, CR 23(b)(2) is appropriate. Defendants' allege that the
14 primary purpose of this litigation is monetary, i.e. to compensate persons who remove Zonolite
15 Attic Insulation.

16 Plaintiffs' complaint indicates it is seeking injunctive relief and other equitable remedies
17 including a notification program, development of safety procedures and remediation techniques.
18 In it's Supplemental Submission plaintiffs' characterize as "incidental" requests for damages
19 some class members may make for expenses already incurred to remove Zonolite. It also
20 acknowledges that there may be damage claims if they are successful in obtaining equitable
21 relief.

22 The question is what is the primary purpose of the litigation. This court accepts the
23 plaintiffs' assertion that equitable relief is the primary purpose although monetary damage claims
24 would not be unexpected if plaintiffs prevail. The purpose of class action litigation is to allow
25 individuals, who have common causes of action, to pool their resources and pursue legal relief

1 which would otherwise be unavailable due to the cost of litigation and the individual amount of
2 damages involved.

3 It is also a benefit to both plaintiffs and defendants that putative class members litigate
4 the class issues in one proceeding to avoid inconsistent adjudications. Defendants have raised
5 the concern that legal actions involving Zonolite are relatively new and there is no "track record"
6 of court decisions as a reason for finding class certification is premature. That position flies
7 squarely in the face of CR 23(b)(1)(A) which recognizes that in cases affecting substantial
8 numbers of persons, defendants should not be subjected to inconsistent standards of conduct
9 imposed by multiple court decisions.

10 Finally, defendants rightly point out that asbestos is heavily regulated by federal agencies
11 and Zonolite is under review by the EPA. Arguably, the resources of a federal regulatory agency
12 are greater than a state superior court and this court has considered that fact. However, federal
13 regulation does not preclude class litigation or preempt the court's ability to take jurisdiction.

14 Therefore, the plaintiff Motion for Class Certification under CR 26(b)(2) is granted. Ms.
15 Scott, please prepare the appropriate order, secure lead counsels' signatures and/or note the order
16 for presentment.

17 Dated this 28th day of November, 2000.

18
19 
20 KATHLEEN M. O'CONNOR
21 SUPERIOR COURT JUDGE
22
23
24
25

FILED

REC'D
4/2/01

ANDREW J. CASNER, JR.
(1974-1999)
THOMAS D. EDWARDS
(1976-1987)
HASKELL A. KASSLER
WALTER H. MAYO III
MARTIN E. GREENBLATT
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MATTHEW L. LUNENFELD

ANITA W. ROBBY
OF COUNSEL

March 30, 2001

Hector D. Geribon, Esq.
Leiff, Cabraser, Heimann & Bernstein, LLP
214 Union Wharf
Boston, MA 02109-1216

Re: Document Production at Winthrop Square – Confidentiality Stipulation

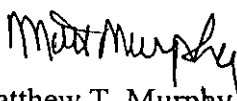
Dear Hector:

As we discussed over the telephone this morning, enclosed please find a revised Agreement of Confidentiality of Indices which reflects the changes to paragraphs 5 and 6 which you and I have previously discussed. Please have Mr. Sobol execute the agreement and return it to me and I will forward you a copy of the fully executed version.

I have also enclosed a copy of Merrill's bill for the two copy sets of both the Attorney Review index and the Bentall list. Your two copies of these indices will be made available to you upon payment of the enclosed invoice.

Please give me a call if you have any questions.

Sincerely,


Matthew T. Murphy

MTM:ml
Enclosures
52000.43/181153

cc: Robert A. Murphy, Esq. (w/encls.)

AGREEMENT OF CONFIDENTIALITY OF INDICES

The plaintiffs, who are identified as all persons represented by Lieff, Cabraser, Heimann & Bernstein, LLP, in asbestos-related class actions pending in Federal and State courts ("plaintiffs"), and the defendant, W.R. Grace & Co.-Conn. ("Grace"), agree to abide by the terms of an Agreement of Confidentiality, as set forth below:

1. Plaintiffs' counsel of record and the lawyers, paralegals, secretaries and other employees of said counsel's offices are hereinafter referred to as "plaintiffs' attorneys." The term "plaintiffs' attorneys" is not intended to include experts, consultants and others who are retained by plaintiffs' counsel of record.

2. Indices were prepared by or at the direction of retained counsel for Grace with respect to documents maintained by the law firm of Casner & Edwards in Boston, Massachusetts. Grace agrees to provide said indices to plaintiffs' attorney, pursuant to the terms of confidentiality set forth in paragraphs 3-12.

3. Plaintiffs' attorneys agree to keep the contents of the indices of documents confidential, and shall not disclose in any manner the contents of the indices to any other person. Furthermore, plaintiffs' attorneys agree that the production of the indices by Grace shall not be deemed to waive either the work product or attorney-client privilege in these cases or in any other case.

4. The indices shall be used by plaintiffs' attorneys only for pretrial proceedings in these cases and at the trial of these cases and shall not be used for any other purpose.

5. Plaintiffs' attorneys will be provided with two copies of the indices, will make no additional copy thereof, and will maintain said copies in a manner so as to prevent their disclosure to individuals other than plaintiffs' attorneys.

6. Each person to whom the indices are to be disclosed shall be provided with a copy of this Agreement of Confidentiality prior to said disclosure. No person to whom the indices are disclosed shall divulge the contents of same to any other person except as provided herein, or shall use the indices for any purpose other than in connection with these cases.

7. If Grace claims any document plaintiffs request contains trade secrets or commercially sensitive information, plaintiffs' attorneys shall agree to a confidentiality Order. In the event plaintiffs will not agree to such a confidentiality Order, the document will be produced to the Court under seal for resolution by appropriate Order.

8. That portion of any deposition, interrogatory or request for admission and responses/answers thereto involving or referring to the contents of the indices shall be treated as confidential subject to the provisions of this Agreement of Confidentiality. That portion of any document involving or referring to the contents of the indices, filed with a court, shall be filed under seal and kept under seal until further order of the court.

9. If any person or entity, private or governmental, requests or subpoenas or orders production of the indices or information contained therein, or requires testimony regarding the indices or information contained therein which plaintiffs' attorneys or any other person has obtained under the terms of this Agreement of Confidentiality, plaintiffs' attorneys or such other person shall immediately notify Grace of such request, subpoena or order, and shall give notice to the person or entity requesting this

confidential material that the requested information is subject to this Agreement of Confidentiality.

10. Any claim by Grace that the provisions of this Agreement of Confidentiality have been breached by plaintiffs' attorneys may be brought to the attention of the court by an appropriate Petition or Motion at which time the court will be asked to consider and determine whether a breach did, in fact, occur and the appropriate relief/sanction to be imposed for same.

11. At the conclusion of these cases, the indices and all excerpts or summaries thereof (including but not limited to excerpts or summaries in pleadings, briefs and memoranda) shall be returned to Grace.

12. The provisions of this Agreement of Confidentiality may be modified, amended or revised in the future upon the Motion of plaintiffs or Grace as granted by further order of the court or by agreement of the parties.

Entered this ____ day of _____, 2001.

Thomas M. Sobol, Esq.
Lieff, Cabraser, Heimann & Bernstein, LLP
214 Union Wharf
Boston, MA 02109
(617) 720-5000

Attorney for Plaintiffs

Robert A. Murphy, Esq.
Casner & Edwards, LLP
One Federal Street, 27th Floor
Boston, MA 02110
(617) 426-5900

Attorney for W.R. Grace & Co.-Conn.

MERRILL CORPORATION



Location: 1240 - BOS-DMS

Any Inquiries, Call (617) 542-0300

CASNER & EDWARDS

One Federal Street
27th Floor
Boston, MA 02110

Attn: Matt Murphy

Invoice #: 1240-255226

Invoice Date: 03/28/01

Merrill Project #: X2756BOS01

Merrill Job #: X01BOS2761

Date Rec'd: 03/23/01

Salesperson: Anthony Santiago

Class: DMS/RE

AMOUNTS DUE UPON RECEIPT

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
	Billing Reference: 52,000/043 - work product Indicies for plaintiff		
	Rec'd: 03/23/01		
	Del'd: 03/26/01		
23157	Light Litigation Copy Work (2 Sets)	\$0.15	\$3,473.55
6655	Medium Litigation Copy Work (2 Sets)	\$0.185	\$1,231.18
	Subtotal		\$4,704.73
	5.00% Sales tax		\$235.24
	TOTAL AMOUNT DUE		\$4,939.97

OK
MTM

SHIP TO: MERRILL CORPORATION
CM-9638
ST. PAUL, MN 55170-0638

PLEASE PAY FROM THIS INVOICE
(1.5% SERVICE CHARGE PER MONTH ADDED TO PAST DUE ACCOUNTS)

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ANITA W. ROBBY
OF COUNSEL

March 29, 2001

BY FAX AND FIRST CLASS MAIL

Thomas M. Sobol, Esq.
Lief, Cabraser, Heimann & Bernstein, LLP
214 Union Wharf
Boston, MA 02109-1216

Re: MDL 1376 - In re: Zonolite Attic Insulation Products Liability Litigation

Dear Tom:

I am writing in response to your letter dated March 19 which I received on Thursday, March 22.

The discs that will be produced on April 2 will only include invoices. The invoices will be supplied on compact discs with the images recorded in TIFF format. The images will not be linked to any database but the CD will include information identifying the bates range, the box number, the file folder identification and the clip range. This identification information will be in the ASCII delimited format.

With regard to the ledger boxes in Colorado, the EPA has not allowed us to ship them back to Boston. If you wish to review them in the near future, the review will have to take place in Colorado. There is nothing Grace can do to change that. The ledgers are not duplicative of the invoices we intend to produce on discs April 2 because the ledgers have not been put onto discs. We assume, but do not know that there could be duplication of information in the two types of documents because both invoices and ledgers track sales. Grace has not done any cross checking to determine if there is any such duplication. In addition to the ledgers in Colorado, there are approximately 60-70 boxes of potentially responsive ledgers recently identified in connection with Grace's ongoing review of dead storage materials in Cambridge. It is not known whether these ledgers are duplicative of the ledgers in Colorado but they can be made available for your immediate review in Boston at Winthrop Square.

With regard to your question about electronic imaging of documents that have been produced to the EPA, Grace began providing documents responsive to the EPA's first through fourth requests on compact disc in TIFF format in approximately mid November, 2000. Prior to that date, Grace produced paper copies of documents to the EPA. Grace is in the process of putting onto compact discs the paper copies produced to the EPA. Apart from the possibility of

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Thomas M. Sobol, Esq.
March 29, 2001
Page 2

multiple file copies of the same documents, the documents which have been provided to the EPA on disc beginning mid November, 2000 are not duplicative of the documents which were produced before that date to the EPA.

To the extent that requests made by plaintiffs in the various state and federal class actions and requests made by the EPA ask for similar documents, there will be duplication between what Grace intends to produce to plaintiffs and what Grace has produced and will produce to the EPA either in hard copy or on compact disc. During the course of its rolling production of documents, Grace intends to produce copies of relevant, non-privileged documents that it has produced to the EPA.

With regard to Grace's intention to produce discs as opposed to originals of documents stored in Cambridge, I believe the concerns noted in your letter are unwarranted. While at first blush, it may appear that your doing an "initial cut" of the hard copies of the documents would be most effective, you should bear in mind that we are talking about a universe of something in excess of 5,000 boxes which may or may not contain responsive documents. Grace has been working for months to narrow the scope of the documents at issue in these cases by excluding documents which are not responsive to any of plaintiffs' requests and believes that its decision to produce a smaller group of responsive or potentially responsive documents, as opposed to an overwhelming number of boxes that would include non-responsive documents, is to plaintiffs' benefit. In addition, many of the boxes stored in Cambridge contain privileged and/or other confidential materials and it would therefore be impossible to produce the documents "as is." As for the questions listed in your letter on page 2 section (iii), as noted above, the images are in TIFF format and are stored on compact disks. Grace will not be producing the images with a linked database as the only database it has created in connection with this review is attorney work product. However, as is also noted above, the compact discs will include information which will identify the bates range, the box number, the file folder and the clip range for the images provided.

Grace strongly disagrees with the implication in your letter that providing the images without a linked database would be useless. Had the documents been produced in their original, paper format, you would have been free to organize your copies of those documents in whatever manner you saw fit, including but not limited to creating your own database. The images Grace will provide to you will be identified by their source box and will contain information indicating their original location within the source box with the exception of the invoices which will be produced starting on April 2 and certain "unscannable materials." The "unscannable materials" include such things as videotapes, oversized documents such as blue prints, poor quality originals and other materials unsuitable for electronic imaging. The unscannable materials will be made available to you in their original form but they will have been removed from their original source box. The compact discs will contain a marker noting that specific unscannable

CASNER & EDWARDS, LLP

Thomas M. Sobol, Esq.
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Page 3

materials have been removed and identifying the current location of such materials. In choosing to produce discs versus originals, the only significant difference, apart from the benefit to plaintiffs of significantly reduced costs, is that you will receive an electronic image as opposed to a paper one.

I believe this answers all of your questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bob", written in black ink.

Robert A. Murphy

RAM:ml

cc: Elizabeth J. Cabraser, Esq. (by First Class Mail)
David Pastor, Esq. (by First Class Mail)
John J. Stoia, Jr., Esq. (by First Class Mail)
Edward J. Westbrook, Esq. (by First Class Mail)
Sheila L. Birnbaum, Esq. (by First Class Mail)
James R. Carroll, Esq. (by First Class Mail)
Arlene Fickler, Esq. (by First Class Mail)
James J. Restivo, Esq. (by First Class Mail)

52000.43/180552

**THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
)	
W.R. GRACE & CO., et al.,	)	Case No. 01-01139 (JJF)
	)	(Jointly Administered)
Debtors.)	
	)	Objections Due By: 8/30/01 @ 4:00 p.m.
	)	Hearing Date: 09/07/01 @ 1:00 p.m.

NOTICE OF MOTION

TO: Parties required to receive notice pursuant to Del.Bankr.LR 2002-1.

The United States has filed a **Motion for an Order Compelling Debtors To Supplement Statements of Financial Affairs (and Memorandum in Support)** which requests this Court to compel Debtors to supplement their Statements of Financial Affairs by completing Question 17 of Official Bankruptcy Form 7.

You are required to file a response to the attached motion on or before **August 30, 2001 at 4:00 p.m.**

At the same time, you must also serve a copy of the response upon the Movant's attorney:


JAMES D. FREEMAN
Trial Attorney
U.S. Department of Justice
Environmental Enforcement Section
999 18th Street
Suite 945-North Tower
Denver, Colorado 80202
Facsimile (303) 312-7331

HEARING ON THE MOTION WILL BE HELD ON September 7, 2001 at 1:00 p.m.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED WITHOUT FURTHER NOTICE OR HEARING.

Date: July 20, 2001

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Div.
U.S. Department of Justice


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ANDREA MADIGAN
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Denver, Colorado 80202

**THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

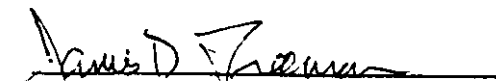
In re:	)	Chapter 11
)	
W.R. GRACE & CO., et al.,	)	Case No. 01-01139 (JJF)
	)	(Jointly Administered)
Debtors.)	
	)	Objections Due By: 8/30/01 @ 4:00 p.m.
	)	Hearing Date: 09/07/01 @ 1:00 p.m.

**MOTION OF THE UNITED STATES FOR ENTRY OF AN ORDER COMPELLING
DEBTORS TO SUPPLEMENT STATEMENTS OF FINANCIAL AFFAIRS**

The United States respectfully requests this Court to compel Debtors to supplement their Statements of Financial Affairs to include a complete and detailed response to Question 17 of the Official Bankruptcy Form 7. The United States also requests that this Court order Debtors to examine the amendments to Official Bankruptcy Form 7, effective December 1, 2000, and determine whether other required information was omitted from their Statements of Financial Affairs. A memorandum in support of this motion is attached.

Respectfully submitted,

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**THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
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W.R. GRACE & CO., et al.,)	Case No. 01-01139 (JJF)
)	(Jointly Administered)
Debtors.)	
)	Objections Due By: 8/30/01 @ 4:00 p.m.
	)	Hearing Date: 09/07/01 @ 1:00 p.m.

**MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES
FOR AN ORDER COMPELLING DEBTORS TO
SUPPLEMENT STATEMENTS OF FINANCIAL AFFAIRS**

The United States respectfully requests this Court to compel W.R. Grace & Co. and affiliated entities ("Debtors") in the above-captioned cases to supplement their Statements of Financial Affairs to include a complete and detailed response to Question 17 of the required form. Debtors failed to provide responses to this required question in their Statements of Financial Affairs filed with the Court, and have thus far refused to supplement their statements.

BACKGROUND

Question 17 of the Statement of Financial Affairs requires debtors to disclose certain information related to environmental matters. Specifically, Question 17 requires debtors to divulge any "writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law," indicate any "notice to a governmental unit of a release of Hazardous Material," and list any "judicial or administrative proceedings, including settlements or orders, under any Environmental Law. . . ." 11 U.S.C., Official Bankruptcy Form 7.

Debtors filed their Statements of Financial Affairs in this case on June 8, 2001. Debtors' statements did not include a response to Question 17. On July 3, 2001, the United States

informed Debtors of this omission and asked that Debtors supplement their Statements of Financial Affairs as soon as possible to include the required information. (Letter from Madigan to Baer of July 5, 2001, attached at Tab 1.) At Debtors' request, the United States sent a follow-up letter on July 5, 2001 that set forth the basis for the United States' contention that Debtors' Statements of Financial Affairs were incomplete. The letter contained copies of relevant excerpts from 11 Lawrence P. King, Collier on Bankruptcy § 8.41[2] (15th ed. 2001) which discusses the history and background of the Statement of Financial Affairs (including Question 17), and the text of Question 17.

On July 13, 2001, the United States sent a second letter in response to Debtors' refusal to concede that a response to Question 17 was required (or even that Question 17 existed) and Debtors' unwillingness to specify a date certain by which they would supplement their Statements of Financial Affairs. (Letter from Freeman to Schwartz of July 13, 2001, attached at Tab 2.) This letter referred Debtors to additional authority regarding the existence of Question 17, including the collection of rules and forms (including substantial background information regarding amendments) maintained by the Federal Judiciary on the Internet at www.uscourts.gov.

ARGUMENT

I. A Response to Question 17 of the Statement of Financial Affairs is Required

Debtors must file a Statement of Financial Affairs. 11 U.S.C. § 521(1); Fed. R. Bank. P. 1007(b)(1). Debtors are required to "observe[] and use[]" the Official Forms prescribed by the Judicial Conference of the United States when preparing their Statement of Financial Affairs. Fed. R. Bankr. P. 9009; see also Fed. R. Bankr. P. 1007(b)(1) (Statement of Financial Affairs and

other disclosure documents must be "prepared as prescribed by the appropriate Official Form[.]"

While Rule 9009 allows the user of the Official Forms to make "alterations as may be appropriate," see id., it does not permit debtors to ignore particular questions in their response. The use of the Official Forms is subject to a "rule of substantial compliance." See 11 U.S.C., Official and Procedural Bankruptcy Forms, Introduction and General Instructions. As described in the Introduction and General Instructions for the Official Forms, a document will meet the standard of "substantial compliance" only if the document "contains the complete substance, that is, all of the information required by the Official Form." Id. Accordingly, when a debtor prepares its Statement of Financial Affairs, the debtor must use Official Bankruptcy Form 7 and answer all required questions in order for the statement to be complete.

In this bankruptcy, W.R. Grace & Co and affiliated entities have not completed Question 17 of the Statement of Financial Affairs set forth in Official Bankruptcy Form 7. Debtors appear to take the position that they were not aware of the disclosure requirement that this question imposes. While Question 17 is a relatively recent addition to the Statement of Financial Affairs (it was added in amendments effective December 1, 2000), it strains credulity that a high-profile debtor with sophisticated legal and accounting assistance would be caught unawares by a change to bankruptcy law. Nevertheless, even assuming that Debtors were unaware of the disclosure requirements of Question 17, the obvious remedy is to require Debtors to promptly supplement their Statement of Financial Affairs to include the missing information, and not (as Debtors seem to advocate) excuse them from their legal obligation to provide it.^{1/}

^{1/} The United States also requests that the Court order Debtors to examine other aspects of the amendments effective December 1, 2000, determine whether any other required information was omitted from their Statements of Financial Affairs, and, if so, supplement their statements to

II. The Information Elicited in Question 17 Serves an Important Governmental Purpose

Question 17 of the Statement of Financial Affairs is not a "make-work" exercise that can be disregarded at the option of a busy debtor. The information that Question 17 elicits from debtors allows federal, state and local environmental authorities, as well as trustees and other parties in interest in the bankruptcy case to assess environmental liabilities that have existed or may exist on a debtor's properties. Without this information it is difficult – and in some cases may be impossible – for governmental entities and parties in interest to accurately and efficiently determine the nature and extent of a debtor's environmental responsibilities in a bankruptcy case and any risks to the public posed by property of the estate.

This is particularly true in circumstances where a debtor has far-flung operations, involving multiple business units operating hundreds of distinct facilities within the jurisdiction of dozens of governmental entities. This bankruptcy nicely illustrates the difficulties presented. Debtors are a group of 62 companies, many of which operate in several locations across the country. Large debtors like W.R. Grace with sophisticated environmental affairs departments are in far better position than other parties in interest to determine whether a Debtor has received notice from a State or local environmental authority that it may be in violation of an environmental law at a particular site or whether a Debtor has informed a State or local authority that there has been a release of a hazardous substances at a particular site. Such information is critical to parties in interest understanding the environmental responsibilities and liabilities of the

include responses to this additional required information.

debtor. It is precisely for this reason that the Rules Committee added a requirement for environmental disclosure to the Statement of Financial Affairs.


As a result, Debtors' failure to respond to Question 17 is prejudicial to the United States and other parties in interest.

CONCLUSION

For the foregoing reasons, the United States requests that this Court compel Debtors to supplement their Statements of Financial Affairs by completing, within thirty days, Question 17 of Official Bankruptcy Form 7 and file it with the Court.

Respectfully submitted,

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DENVER, CO 80202-2466

<http://www.epa.gov/region08>

Ref:8ENF-L

July 5, 2001

BY FAX - 312-861-2200 & U.S. Mail

Janet Baer
Kirkland & Ellis
200 East Randolph Street
Chicago, Illinois 60601

RE: In re W.R. Grace & Co. & Affiliated Debtors
(USBC Del) Bankruptcy Case No. 01-01139

Dear Ms. Baer:

This follows our telephone conversation of Tuesday, July 3, 2001, and your July 5, 2001, voice mail to Jim Freeman of the U.S. Department of Justice. As we discussed on Tuesday, effective last Fall, the Standing Committee on Bankruptcy Rules approved amendments to Official Bankruptcy Form 7, the Statement of Financial Affairs, to include among other things, certain environmental disclosures. Question 17 of the current version of Official Bankruptcy Form 7 requires debtors to answer questions on environmental matters. I have enclosed from 11 *Collier on Bankruptcy* §8.41 (as I cited to you in our phone call) the discussion of the 2000 amendments along with the text of Question 17.

As we also discussed, it appears that WR Grace & Co., and all of the affiliated debtors failed to include the environmental information that was required to be included in their respective Statements of Affairs. We request that each of these debtors supplement their Statement of Affairs to include this environmental information within the next twenty (20) days.

We appreciate your attention to this matter. Please call me at (303) 312-6904 if you have any questions or wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrea Madigan".

Andrea Madigan
Enforcement Attorney

Enclosures

Tab 1



Printed on Recycled Paper

to the person filing the list and the attorney. *See* Bankruptcy Rule 4003(b). The entity, other than the clerk, transmitting a paper to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the paper and stating the date on which it was transmitted to the United States trustee. *See* Rule 5005(b)(2).

Additional Requirements. Consult local rules for possible additional requirements.

[2]—Statement of Financial Affairs

[A]—Completion of the Statement

Unless the court orders otherwise, the debtor shall file a statement of financial affairs. *See* 11 U.S.C. § 521(1) and Bankruptcy Rule 1007(b)(1). This statement is to be completed by every debtor. Questions 1-18 are to be completed by all debtors, including those filing under chapter 12 or 13. Debtors that are or have been in business also must complete questions 19-25.

The Committee Note which accompanied this official form follows:

This form consolidates questions from former Official Forms No. 7, No. 8, and No. 10. This form is to be completed by all debtors. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

The Chapter 13 Statement, former Official Form 10, has been abrogated. Chapter 13 debtors are to complete this statement and the schedules prescribed in Official Form No. 6.

All questions have been converted to affirmative directions to furnish information, and each question must be answered. If the answer is "none," or the question is not applicable, the debtor is required to so state by marking the box labeled "None" provided at each question.

See Committee Note to Form 2 for a discussion of the unsworn declaration at the end of this form.

The Committee Note which accompanied the 1993 amendment of this official form reads:

Official Form 7 has been amended in two ways. In the second paragraph of the instructions, the third sentence has been deleted to

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clarify that only a debtor that is or has been in business as defined in the form should answer Questions 16-21, now Questions 19-25 in Form 7, as amended in 2000. In addition, administrative proceedings have been added to the types of legal actions to be disclosed in Question 4a.

The Advisory Committee Note which accompanied the 1995 amendment of Official Form 7 reads:

This form is a "document for filing" that may be prepared by a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110, which was added to the Code by the Bankruptcy Reform Act of 1994; accordingly, a signature line for such preparer is added. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested.

The Advisory Committee Note accompanying the 2000 amendment of Official Form 7 reads:

The form has been amended to provide more information to taxing authorities, pension fund supervisors, and governmental units charged with environmental protection and regulation. Four new questions have been added to the form, covering community property owned by a debtor and the debtor's non-filing spouse or former spouse (Question 16), environmental information (Question 17), any consolidated tax group of a corporate debtor (Question 24), and the debtor's contributions to any employee pension fund (Question 25). In addition, every debtor will be required to state on the form whether the debtor has been in business within six years before filing the petition and, if so, must answer the remaining questions on the form (Questions 19-25). This is an enlargement of the two-year period previously specified. One reason for the longer "reach back" period is that business debtors often owe taxes that have been owed for more than two years. Another is that some of the questions already addressed to business debtors request information for the six-year period before the commencement of the case. Application of a six-year period to this section of the form will assure disclosure of all relevant information.

[B]—Procedural Considerations

Filing. File an original and two copies with the clerk of the bankruptcy court. One copy is for transmission by the clerk to the United States trustee. Local rules may require additional copies.

None

- ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the **six-year period** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

17. Environmental Information

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

None

- ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERN- MENTAL UNIT	DATE OF NOTICE	ENVIRONMEN- TAL LAW
-----------------------------	--------------------------------------------------------	-------------------	------------------------

None

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COMMENCEMENT OF THE VOLUNTARY CASE

Form 8.43-1

- ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERN- MENTAL UNIT	DATE OF NOTICE	ENVIRONMEN- TAL LAW
-----------------------------	--------------------------------------------------------	-------------------	------------------------

None

- ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMEN- TAL UNIT	DOCKET NUMBER	STATUS OR DISPOSI- TION
--------------------------------------------------	------------------	-------------------------------

18. Nature, location and name of business

None

- ☐ a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the six years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the six years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the six years immediately preceding the commencement of this case.



U.S. Department of Justice

Environment and Natural Resources Division

JMG:JDF
90-11-2-07106

Environmental Enforcement Section
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

Telephone: (303) 312-7376
Facsimile: (303) 312-7331

July 13, 2001

Samuel A. Schwartz, Esq.
Kirkland & Ellis
200 East Randolph Street
Chicago, Illinois 60601
Fax: (312) 861-2200

Re: In re W.R. Grace & Co., et al. (Bankr. D. Del.); Case No. 01-01139

Dear Mr. Schwartz:

I would like to follow up on your telephone conversations earlier this week with Andrea Madigan of the United States Environmental Protection Agency ("EPA") regarding the failure of W.R. Grace & Co. and its affiliated debtors ("Debtors") to file complete Statements of Affairs in their respective bankruptcy cases. Specifically, Debtors' Statements of Affairs do not include responses to Question 17 of the current version of Official Bankruptcy Form 7. On July 5, 2001 we advised Janet Baer of your firm of this deficiency and requested that the Debtors supplement their respective Statements of Affairs to answer Question 17, which requires disclosure of certain environmental information. We also sent Ms. Baer relevant excerpts from Collier on Bankruptcy detailing these disclosure requirements along with the text of Question 17. You subsequently responded to Ms. Madigan that no one in your firm was aware of any obligation to provide the requested information, but said you would look into the matter. You also stated that if you determined that the requested information was required, the Debtors would not be able to supplement their respective Statements of Affairs any time soon due to the press of other bankruptcy issues. You later left Ms. Madigan a voice mail indicating that you had not been able to confirm that Debtors' Statements of Affairs were incomplete, and requested EPA to provide additional authority to support its request.

While we are not in the habit of providing bankruptcy research to debtor's counsel, we refer you to Memorandum by Hon. Adrian G. Duplantier, Chair, Advisory Committee on Bankruptcy Rules, dated May 7, 1999, to Hon. Anthony J. Scirica, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States, and Communication for the Chief Justice, the Supreme Court of the United States, transmitting Amendments to the Federal Rules of Bankruptcy Procedure as Adopted by the Court, pursuant to 28 U.S.C. § 2075, dated May 2, 2000, 106th Cong., 2nd Sess., House Document 106-222. Both of these documents are cited in Collier on Bankruptcy. Also, please note that current versions of Official Bankruptcy Forms are available electronically at the federal judiciary's web site, www.uscourts.gov. They are also available on Westlaw.

July 13, 2001

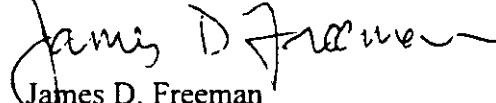
Page 2

Debtors are required to use the Official Forms prescribed by the Judicial Conference of the United States. Fed. R. Bankr. P. 9009. Debtors are not permitted to pick and choose which information they would like to provide. Here, Debtors' failure to respond to Question 17 impairs the United States' ability to assess existing environmental liabilities on Debtors' properties. As a result, EPA is prejudiced in its ability to efficiently and accurately determine what claims it may have against the Debtors.

In light of Debtors' refusal to commit to provide the required information by a date certain, and Debtors' apparent unwillingness to take this matter seriously, we intend to file a motion in Bankruptcy Court to compel the Debtors to comply with Bankruptcy Rule 9009 and supplement their Statements of Affairs with the required information. I expect to file this motion as soon as practicable absent Debtors' commitment to supplement their Statements of Affairs by an agreed date certain.

Please contact me if you have any questions about this matter.

Sincerely,


James D. Freeman
Trial Attorney

cc: Andrea Madigan, EPA

**THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
)	
W.R. GRACE & CO., et al.,	)	Case No. 01-01139 (JJF)
	)	(Jointly Administered)
Debtors.)	

ORDER

Upon motion of the United States requesting an Order compelling the above-captioned Debtors to supplement their Statements of Financial Affairs to include a complete and detailed response to Question 17, as set forth in Official Bankruptcy Form 7, it is hereby:

ORDERED that Debtors shall supplement their Statements of Financial Affairs to include a complete and detailed response to Question 17, as set forth in Official Bankruptcy Form 7;

ORDERED that Debtors shall examine the amendments to Official Bankruptcy Form 7, effective December 1, 2000, to determine whether any other required information was omitted from their filed Statements of Financial Affairs; and

ORDERED that Debtors shall file revised Statements of Financial Affairs within thirty (30) days of this date.

DATED: This ____ day of _____, 2001.

BY THE COURT:

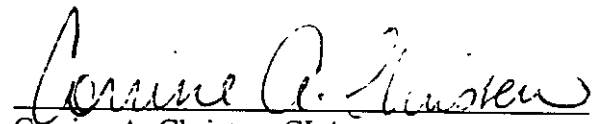
Joseph J. Farnan, Jr.
United States District Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
)	
W.R. GRACE & CO., <u>et al.</u>,	)	Case No. 01-01139 (JJF)
	)	(Jointly Administered)
Debtors.)	

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2001, I caused a copy of the **Notice of Motion; the Motion of the United States for an Order Compelling Debtors To Supplement Statements of Financial Affairs; and the Memorandum in Support of Motion of the United States for an Order Compelling Debtors To Supplement Statements of Financial Affairs** to be served via U.S. mail, postage prepaid, upon the parties-in-interest on the attached service list.


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